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REPLY BRIEF

SUPREME COURT OF KENTUCKY
FILE NO. 75-1051

FRANK CHENAULT, JR.

APPELLANT

V.

COMMONWEALTH OF KENTUCKY

APPELLEE

APPEAL FROM MADISON CIRCUIT COURT
HON. JAMES S. CHENAULT, JUDGE

REPLY BRIEF FOR APPELLANT

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This certifies that true copies
of this Reply Brief for Appellant
were served this 25TH day of
February, 1976, upon Hon. James
S. Chenault, Madison Circuit Judge,
Richmond, Kentucky 40475; Hon.
Charles T. Walters, Commonwealth's
Attorney, Winchester, Kentucky 40391;
and Hon. Robert F. Stephens, Attorney
General, Frankfort, Kentucky 40601.



DAVID B. REDWINE
Attorney for Appellant

FILED

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SUPREME COURT

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REPLY BRIEF FOR APPELLANT

MAY IT PLEASE THE COURT:

PURPOSE OF THE BRIEF

This Reply Brief for the Appellant is submitted to rebut the arguments presented by the Appellee, and to distinguish the case law upon which Appellee's arguments are based.

QUESTIONS TO WHICH BRIEF ADDRESSED

- I. DID THE TRIAL COURT ERR IN PERMITTING INTO EVIDENCE A TAPE-RECORDED CONVERSATION BETWEEN THE APPELLANT AND HIS WIFE OVER THE OBJECTIONS OF THE APPELLANT?
- II. WAS THE CLOSING ARGUMENT BY THE ASSISTANT COMMONWEALTH'S ATTORNEY INFLAMMATORY AND PREJUDICIAL, AND AS SUCH CONSTITUTES REVERSIBLE ERROR?

ARGUMENT

- I. THAT THE ADMISSION AS EVIDENCE OF A TAPE-RECORDED TELEPHONE CONVERSATION BETWEEN THE APPELLANT AND HIS WIFE WAS IMPROPER, AND VIOLATED THE APPELLANT'S RIGHT TO PROTECTION OF CONFIDENTIAL MARITAL COMMUNICATIONS.

K.R.S. 421.210(1) provides that husband and wife may not testify as to confidential communications between them during marriage, and that neither may be compelled to testify for or against the other, inter alia. At the trial of the instant case, the Appellant claimed this privilege, and objected to the testimony by his wife relative to a telephone conversation between them at a time when they were still married, and the Appellant objected to the introduction of a tape-recording which purported to be a conversation between the parties.

In applying this statute, it is important that the Court note the intent of the statute and the purpose for which it was adopted. It is the marital trust and loyalty which arises from that relationship which leads to confidential communications, and one who communicates to his spouse should be able to anticipate that such communication would remain confidential. Thus, the privilege is primarily preserved for the benefit of the communicating spouse, but also includes either spouse who chooses to claim it. The purpose of the statute is to promote marital harmony, and to promote unapprehensive communications between married parties. If the communicating spouse cannot claim this privilege if the situation later requires, then married parties will be effectively deterred

from communicating any information to their spouse, since they cannot anticipate that such information will remain confidential. To continue the rule urged by the Commonwealth in the instant case would stifle free and continuing communications between spouses, and would inevitably result in disharmony between the parties. This privilege against the revelation of marital communications is intended to secure freedom from apprehension in the mind of the one desiring to communicate, and thus should belong to the one who speaks rather than the one who listens. 8 Wigmore on Evidence, Sec. 2340.

The courts of other states which have statutes similar to that of Kentucky have held that this privilege belongs to the communicating spouse, and that the communicating spouse can invoke this privilege by objecting to the introduction of evidence by a spouse as to those confidential communications. See Citations, Brief for Appellant, page 11. Further, in the recorded conversation played for the jury in the instant case, the Appellant suggested the possibility of his entering a plea of guilty to an offense charged at that time, that of rape. As acknowledged by the Commonwealth in the Brief for Appellee, the indictment against the Appellant for rape was later dismissed, and the charges to which he proposed entering a plea of guilty were not those charges for which he was tried and convicted in the instant case. Since evidence in the recording was evidence of another crime, same was inadmissible. This evidence tainted the entire recording, since most of the conversation in the recording referred to these charges pending against the Appellant. For purposes of rebuttal

only, a short portion of the tape could have been played so as to identify the voices of the Appellant and that of his former wife, the witness on rebuttal. The content of the tape was not relevant to its use on rebuttal, and should have been excluded.

II. THAT THE CLOSING ARGUMENT BY THE ASSISTANT
COMMONWEALTH'S ATTORNEY WAS INFLAMMATORY
AND PREJUDICIAL, AND AS SUCH WAS REVERSIBLE
ERROR.

Although the Appellee in its Brief detailed the facts in several of the cases cited by the Appellant, only one reference was made by the Appellee to the actual content of the closing argument by the Assistant Commonwealth's Attorney in the instant case. This referral pertained to the apparent qualification by the Assistant Commonwealth's Attorney that the tape-recording played for the jury was merely for the purpose of rebutting the Appellant's testimony that he (the Appellant) had never asked his wife to drop the charges against him. Although the Appellant answered no he had never asked his wife to drop the charges of sexual abuse and indecent and immoral practices, he had, as indicated by the tape-recording, asked her to drop the false charges of rape. And even though the Assistant Commonwealth's Attorney attempted to qualify the use of the tape-recording in his closing argument as rebuttal material, he then proceeded to use the content of that tape-recording to attempt to show the guilt of the Appellant by the Appellant's offer to plead guilty to the original false charges.

The Appellee cannot defend the inflammatory and prejudicial statements which permeate the closing argument of the Commonwealth. The Assistant Commonwealth's Attorney, not under oath, gave information to the jury far above and beyond that furnished to the jury by the young witness. The closing argument of the Commonwealth elaborated and embellished upon the evidence given by the young prosecuting witness, and even speculated on the expert opinion as to the psychological behavior of the Appellant.

The closing argument of the Appellee is inflammatory at first blush, and far exceeds mere comments on the evidence and inferences therefrom. The closing argument of the Commonwealth was clearly calculated to inflame the passions of the jury in order to produce a verdict of guilty and a harsh sentence.

When the remarks of the Assistant Commonwealth's Attorney in his closing argument are completely foreign to anything appearing in the case, and if they are made for the purpose of taking undue advantage of the Defendant, and such was their probable effect, it is the duty of the Court to reverse the judgment rendered upon a verdict so obtained. Jackson v. Commonwealth, 301 Ky. 562, 192 S.W.2d 480 (1946); Music v. Commonwealth, 186 Ky. 45, 216 S.W. 116 (1919); Johnson v. Commonwealth, 188 Ky. 391, 222 S.W. 106 (1920).

CONCLUSION

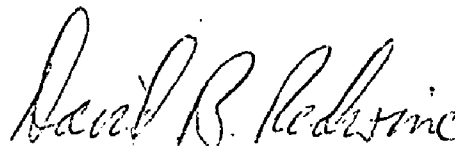
The protection of confidential marital communications is useless unless the person making that communication can later claim that protection. Kentucky law must reflect this, and this

Court should so hold in order that a person communicating to his spouse may later invoke this protection to protect the confidential nature of the communication.

The argument of the Assistant Commonwealth's Attorney in this action clearly exceeded the scope of the evidence presented at trial, and included not only inflammatory and prejudicial statements, but evidence given by the Assistant Commonwealth's Attorney himself. The effect of this was to arouse the passions of the jurors in order to obtain a verdict of guilty and an appropriate penalty, regardless of any bias that might have been injected into such a verdict. As such, the closing argument of the Assistant Commonwealth's Attorney was clearly prejudicial to the Appellant, and as such constitutes reversible error.

For these reasons, the judgment of the Trial Court should be reversed, and a new trial ordered.

Respectfully submitted,



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